Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

JAMES SCHOMIG and JONATHON WALLS,

Petitioners,

vs.

WILLIAM BRACY and ROGER COLLINS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in *Bracy v. Gramley*, 520 U.S. 899 (1997), this Court contemplated that Respondents' death sentences could be overturned where Respondents were not actually held to the burden of proving their trial judge's actual bias against them in their own case.

2. Whether the evidence showed that Respondents' trial judge was actually biased against them in their own case.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, James Schomig and Jonathon Walls,[1] respectfully request that this Honorable Court issue a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit to review the part of that court's *en banc* judgment and opinion, entered on March 29, 2002, affirming the judgment of the United States District Court for the Northern District of Illinois granting habeas corpus relief to Respondents with respect to their jury-imposed death sentences.

OPINIONS BELOW

On March 29, 2002, the United States Court of Appeals for the Seventh Circuit issued its *en banc* opinion affirming the decision of the United States District Court for the Northern District of Illinois, which denied habeas corpus relief to Respondents as to their convictions for three murders, armed robbery and aggravated kidnaping, but granted habeas corpus relief to Respondents as to their jury-imposed death sentences. The Court of Appeals' *en banc* decision is published as *Bracy v. Schomig*, 286 F.3d 406 (7th Cir. 2002), and is reprinted in the separate appendix to this petition. The April 18, 2001 panel opinion of the United States Court of Appeals for the Seventh Circuit, which had affirmed the District Court's decision as to Respondents' convictions but reversed the District Court's decision as to their death sentences, is published as *Bracy v. Schomig*, 248 F.3d 604 (7th Cir. 2001), and is reprinted in the separate appendix to this petition. The decision of the United States District Court for the Northern District of Illinois is reported as *United States ex rel.*

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[1] Walls has replaced Roger Cowan as the warden of the prison where Respondent Collins is in custody.

Collins v. Welborn, 79 F.Supp.2d 898 (N.D. Ill. 1999), and is reprinted in the separate appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its *en banc* judgment on March 29, 2002. Jurisdiction in this Court is proper under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The United States District Court for the Northern District of Illinois asserted jurisdiction in this case pursuant to 28 U.S.C. §2254, and the United States Court of Appeals for the Seventh Circuit asserted jurisdiction under 28 U.S.C. §§1291 and 2253.

Respondents, William Bracy and Roger Collins, were convicted, following a jury trial in the Circuit Court of Cook County, Illinois, of the murders of three victims, as well as of armed robbery and aggravated kidnaping. Following a further jury proceeding, each Petitioner was sentenced to death for his murder convictions, and to concurrent 60-year prison sentences for the armed robbery and aggravated kidnaping convictions. Petitioners appealed, and the Illinois Supreme Court affirmed their convictions and sentences. *People v. Collins*, 106 Ill.2d 237, 478 N.E.2d 267 (1985). This Court denied certiorari. *Collins v. Illinois*, 474 U.S. 935 (1985). Petitioners sought, and were denied, post-conviction relief in the Circuit Court of Cook County, Illinois. The Illinois Supreme Court affirmed, *People v. Collins*, 153 Ill.2d 130, 606 N.E.2d 1137 (1992), and again this Court denied certiorari. *Collins v. Illinois*, 508 U.S. 915 (1993).

Respondents then filed separate habeas corpus petitions in the United States District Court for the Northern District of Illinois. The cases were consolidated, and, in a decision entered on August 24, 1994, the District Court denied relief. *United States ex rel. Collins v. Welborn*, 868 F.Supp. 950 (N.D. Ill. 1994). Respondents appealed, and the United States Court of Appeals for the Seventh Circuit affirmed the District Court. *Bracy v. Gramley*, 81 F.3d 684 (7th Cir. 1996). Bracy appealed to this Court, which reversed the Court of Appeals' decision. It found that Bracy had shown good cause for discovery, so that he could attempt to prove that his trial judge engaged in bias against him to compensate for his having accepted bribes in, and thus having granted directed verdicts or acquittals in, other cases. *Bracy v. Gramley*, 520 U.S. 899 (1997). Thereafter, this Court remanded Collins' case for reconsideration in light of the *Bracy* decision. *Collins v. Welborn*, 520 U.S. 1272 (1997).

On remand, the cases were again consolidated, and, after discovery, the District Court, in a decision issued on May 6, 1999, denied the parties' motions for summary judgment. *United States ex rel. Collins v. Welborn*, 49 F.Supp. 2d 597 (N.D. Ill. 1999). Thereafter, in a decision entered on November 24, 1999, the District Court denied habeas relief as to Respondents' convictions, but granted relief as to the Respondents' death sentences. *United States ex rel. Collins v. Welborn*, 79 F.Supp.2d 898 (N.D. Ill. 1999) (App. at 106).[2]

Respondents appealed the denial of habeas relief as to their convictions, and Petitioners cross-appealed the grant of habeas relief as to Respondents' death sentences. In an opinion, issued on April 18, 2001, a majority of a panel of the United States Court of Appeals for the Seventh Circuit affirmed the denial of habeas relief as to Respondents' con-

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[2] App. refers to the Separate Appendix to this petition.

victions but reversed the District Court's grant of habeas relief as to their sentences. *Bracy v. Schomig*, 248 F.3d 604 (7th Cir. 2001) (App. at 64). Respondents petitioned for rehearing and sought rehearing *en banc*. The Court of Appeals granted rehearing *en banc*, and, in a decision issued on March 29, 2002, that court affirmed both the District Court's denial of habeas corpus relief as to Respondents' convictions and its grant of habeas corpus relief as to Respondents' death sentences. *Bracy v. Schomig*, 286 F.3d 406 (7th Cir. 2002) (App. at 22-23).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The *En Banc* Court Of Appeals Violated This Court's Mandate In Granting Habeas Corpus Relief To Respondents From Their Death Sentences Without Holding Respondents To Their Burden Of Proving That Their Trial Judge Was Actually Biased Against Them In Their Own Case.

In *Bracy v. Gramley*, 520 U.S. 899 (1997), and in its ensuing order in *Collins v. Welborn*, 520 U.S. 1272 (1997), this Court remanded these now-again-consolidated cases for Respondents to engage in discovery to determine whether their trial judge practiced compensatory bias against them in their own case in an effort to deflect the fact that he had taken bribes to throw other criminal cases. On remand, after discovery, the District Court found that Respondents had failed to show that their trial judge engaged in such bias in the trial of their case, but had proved that he did so in presiding over the jury hearing on whether they should be sentenced to death. *United States ex rel. Collins v. Welborn*, 79 F.Supp.2d 898, 910, 911 (N.D. Ill. 1999) (App. at 103, 106). On appeal, the majority of a panel of the Court of Appeals affirmed the District Court in its finding that no

such compensatory bias was evident from the trial, but reversed the District Court's finding that the judge had engaged in compensatory bias at Respondents' jury-decided death penalty hearing. *Bracy v. Schomig*, 248 F.3d 604 (7th Cir. 2001) (App. at 63-64).

Subsequently, the Court of Appeals, *en banc*, affirmed the District Court decision *in toto*, finding that there was no evidence of the trial judge having practiced compensatory bias at Respondents' trial, but that there was evidence that he did so in his rulings at Respondents' jury-decided death penalty hearing. *Bracy v. Schomig*, 286 F.3d at 415, 418-419 (7th Cir. 2002) (App. at 15, 22). By Judge Evans' own admission, the *en banc* opinion is divided, both in terms of what this Court meant when it remanded the case in *Bracy v. Gramley*, 520 U.S. 899 (1997), and in terms of what Respondents' evidentiary burden was and how they could meet it. 286 F.3d at 410 (App. at 5). Petitioners believe that the majority of the *en banc* Court of Appeals which found Respondents entitled to a new sentencing hearing is an illusory one, such that this Court's mandate in *Bracy v. Gramley*, 520 U.S. 899 (1997) was violated and therefore a writ of *certiorari* is warranted.

In *Bracy v. Gramley*, 520 U.S. 899 (1997), this Court found that Bracy had shown good cause for obtaining discovery into whether his trial judge had engaged in compensatory bias against him in his own case. In so doing, this Court stated as follows:

> Ordinarily, we presume that public officials have "'properly discharged their official duties.'" [Citations omitted.] Were it possible to indulge this presumption here, we might well agree with the Court of Appeals that petitioner's submission and his compensatory bias theory are too speculative to warrant discovery. But, unfortunately, the presumption has been soundly rebutted: Maloney was

> shown to be thoroughly steeped in corruption through his public trial and conviction. We emphasize, though, that petitioner supports his discovery request by pointing not only to Maloney's conviction for bribe-taking in other cases, but also to additional evidence discussed above, that lends support to his claim that Maloney was actually biased *in petitioner's own case*. That is, he presents "specific allegations" that his trial attorney, a former associate of Maloney's in a law practice that was familiar and comfortable with corruption, may have agreed to take this capital case to trial quickly so that petitioner's conviction would deflect any suspicion that the rigged *Rosario* and *Chow* cases might attract.

(520 U.S. at 909; emphasis added). Given the emphasized language, and the subsequent District Court findings, on remand, that no such association existed between Maloney and the attorney he appointed to represent Bracy, and that no evidence was shown of an agreement to take this case to trial quickly (so that Bracy's conviction would deflect suspicion of Judge Maloney's wrongdoings in other cases), (*United States ex rel. Collins v. Welborn*, 79 F.Supp.2d 898, 905 (N.D. Ill. 1999) (App. at 94),[3] it well might be said that the "sound rebuttal" of the presumption that Judge Maloney properly discharged his official duties was not so sound after all. Viewed in this manner, a grant of habeas corpus relief in this case is not sustainable regardless of which of the theories espoused by the fractured *en banc* Court of Appeals one might adopt.

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[3] Respondents did not seriously contest these findings before the Court of Appeals.

But, even taking this Court's above-quoted statement at face value, it is clear that this Court contemplated that Bracy and Collins would have to prove that Judge Maloney engaged in compensatory bias in their own case. Yet the majority of the *en banc* Court of Appeals, which found that Respondents had so proven with respect to their death penalty hearing, does not actually so find. Judge Evans appears to admit as much, declaring that "Our opinions diverge over exactly what the Supreme Court meant when it said that Bracy and Collins must show 'that Maloney was actually biased *in petitioner's own case*[,]'" and that "[a]lso we seem not to agree on what the petitioners' evidentiary burden is and how they can meet it." (286 F.3d at 410) (App. at 5). The opinion of Judge Rovner, joined by three other judges of the eight-judge majority which affirmed the grant of habeas corpus relief as to Respondents' death sentences, well demonstrates Judge Evans' point. Judge Rovner did state her agreement with Judge Evans' opinion that "that the search for proof of compensatory bias must include indirect, as well as direct, signs of such bias, and that the record in this case supplies us with adequate signs that such bias was at work during the capital phase of Bracy's and Collins' trial." (206 F.3d at 431) (App. at 45). However, she qualified that conclusion by noting that she agreed with Judge Evans' affirmance of the District Court "[i]n that context," i.e., that the State had not come forth with facts which showed that Judge Maloney was a neutral arbiter. (286 F.3d at 432) (App. at 46). The main thrust of her position was that she assumed that, in light of the evidence of Maloney's wrongdoing, either all proceedings over which Maloney presided were tainted by his criminality or that the State should bear the burden to prove that such proceedings were not. (286 F.3d at 427-428) (App. at 39-40). As Judge Posner correctly points out in his opinion, concurring in part and dissenting in part from the *en banc* majority:

> Judge Rovner's opinion in the present round disregards the Supreme Court's mandate. She repeats the position she took in the original appeal—the position the Court disapproved—that *all* of Maloney's convictions (and presumably those of any other bribe-taking judge) must be set aside and that case-specific evidence of compensatory bias is always unnecessary, and indeed irrelevant. The Court made unmistakably clear that compensatory bias must be proved to have been operative in the particular defendant's case.

(286 F.3d at 421) (App. at 27). Judge Posner's position is well supported by this Court's decision in *Bracy v. Gramley*, 520 U.S. 899 (1997). There, this Court noted Judge Rovner's dissenting opinion in *Bracy v. Gramley*, 81 F.3d 684 (7th Cir. 1996), in which she asserted that Respondents had shown sufficient wrongdoing by Judge Maloney to warrant the grant of a writ of habeas corpus, but found as follows:

> The dissenting judge insisted that petitioner had shown "good cause" for discovery to support his judicial-bias claim, 81 F.3d at 696-699 (opinion of Rovner, J.), and went on to state that, in her view, petitioner was entitled to relief whether or not he could prove that Maloney's corruption had any impact on his trial, *id.*, at 699-703. The latter conclusion, of course, would render irrelevant the discovery-related question presented in this case.

Bracy v. Gramley, 520 U.S. 899, 903 fn. 4 (1997).

Accordingly, considering the position of the four concurring and dissenting judges in Judge Rovner's opinion, the so-called "solid majority" of the *en banc* Court of Appeals (286 F.3d at 408) (App. at 2), doctrinally is not so solid. While that "majority" found that Respondents' trial judge engaged in compensatory bias against them at sentencing,

four of the eight judges in that "majority" apparently were willing to assume either that all proceedings over which Maloney presided were the product of Judge Maloney's corruption or that the State bore some burden to demonstrate otherwise. Thus, Respondents have obtained relief from their death sentences without truly having borne the burden of proving that the judge was biased against them in their own case. Surely, this result is not consonant with this Court's earlier holding in this case, and this fact, standing alone, warrants further review of this case by this Court.

Review by this Court is warranted for other reasons, as well. As alluded to above, Judge Evans acknowledged that the *en banc* Court of Appeals was at odds over what Respondents' evidentiary burden was and how they could meet it. 286 F.3d at 410 (App. at 5). Petitioners maintain, as they did in the Seventh Circuit, that this Court envisioned that Respondents would have to adduce direct evidence of bias, and that resort to the state court trial record to find such evidence was inappropriate, where that record already had been deemed clean by the various courts which had reviewed it. A principled rule from this Honorable Court is needed on how to approach such a claim, particularly given the number of cases in which an allegation of compensatory bias might be raised. Judge Maloney himself reputedly presided over thousands of criminal cases. *Bracy v. Schomig*, 286 F.3d at 421, 427, 428 (App., at 27, 37, 39). And, as this Court noted in its original opinion in this case, "Maloney was one of *many* dishonest judges exposed and convicted through 'Operation Greylord,' a labyrinthine federal investigation of judicial corruption in Chicago." *Bracy v. Gramley*, 520 U.S. at 902; emphasis supplied). Unfortunately, in light of this history, this case is unlikely to be unique, and further guidance from this Court is necessary.

II.

The Evidence Did Not Support Granting A Writ Of Habeas Corpus As To Respondents' Death Sentences.

Even assuming that the "majority" of the *en banc* Court of Appeals actually sought to hold Respondents to their burden of proving that Judge Maloney was actually biased against them in their own case, Petitioners maintain that the evidence adduced utterly failed to support the conclusion that he was.

At the outset, Petitioners cannot help but note that even Judge Evans seemed reluctant to hold Respondents to their burden of proving Judge Maloney's actual bias, instead of merely allowing them to rely on Maloney's appearance of bias, as they had urged that they were entitled to do. Relying on *Tumey v. Ohio*, 273 U.S. 510 (1927), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *In re Murchison*, 349 U.S. 133 (1955), and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), in which this Court found due process violations based on judges' mere appearances of bias, Judge Evans found this Court's requirement that Respondents show actual bias "somewhat of a surprising limitation on their claim[.]" 286 F.3d at 410 (App. at 5). Petitioners believe that such reluctance on Judge Evans' part colors his entire analysis, and supports the following suggestion by Judge Posner regarding Judge Evans' opinion:

> The language that I have quoted from Judge Evans's opinion really points in a different direction—toward a conclusion that Maloney created an "appearance of impropriety," concretely that he gave the appearance of being determined to do in Bracy and Collins. Not only need such a determination have nothing to do with compensatory bias, but in an earlier en banc opinion of this court that Judge Evans's opinion neglects to discuss we held that a judge's mere appearance of impropriety does

> not render a judgment in violation of due process. *Del Vecchio v. Illinois Dept. of Corrections,* [31 F.3d 1363 (7th Cir. 1994)] *supra*, 31 F.3d at 1371-72; see also *id.* at 1389, where this ruling is elaborated. Appearances and suspicions are all that the court has going for it in this case.

286 F.3d at 425-426 (App. at 34).

The foregoing aside, Judge Evans' opinion is otherwise indefensible. He starts by finding that

> We see no reason why Bracy and Collins can show bias only by finding a smoking gun, which in this case apparently would be Maloney's confession that he stacked the deck against them to take the heat off himself. Direct evidence of that sort is simply not available. But evidence short of a confession by Maloney is, as we will see, present to support their claim. From that evidence, reasonable inferences can be drawn.

286 F.3d at 411-412 (App. at 9). He follows by pointing to Judge Maloney's appointment of a particular attorney for Respondent Bracy and a number of Maloney's ostensibly pro-prosecution discretionary rulings, and infers that, in light of Maloney's otherwise shady dealings, and his later comments at allocution at his own sentencing hearing, Maloney's actions must have been fueled by his compensatory bias against the Respondents. This analysis is fraught with problems.

First, it seems clear that, in *Bracy v. Gramley*, 520 U.S. 899 (1997), this Court envisioned that the Respondents actually would have to show direct evidence of Judge Maloney's actual bias against them in their case. This Court stated: "It may well be, as the Court of Appeals predicted, that petitioner will be unable to obtain evidence sufficient to support a finding of actual judicial bias of his

case. . ." 520 U.S. at 909. If the record of Respondents' trial and sentencing were to be the source for showing Judge Maloney's alleged compensatory bias against them, there would have been no need for the discovery which this Court ordered. That record was available when this case was before this Court, but this Court rejected the idea that it showed Judge Maloney's actual bias against the Respondents. *Bracy v. Gramley*, 520 U.S. 899, 903 fn. 4 (1997). And Petitioners maintain that resort to that record, after remand, by both the District Court and the Court of Appeals, was inappropriate where that record had never been seen as evincing compensatory bias by Judge Maloney.

Judge Evans' focus on the criminal history of the attorney who Judge Maloney appointed to represent Bracy is equally ill-conceived. Notwithstanding McDonnell's background, after his initial conviction but before trying this case McDonnell had tried approximately 40 murder cases and the Illinois Supreme Court had reinstated his law license. *United States ex rel. Collins v. Welborn*, 79 F.Supp.2d at 905 (N.D. Ill. 1999) (App. at 93). That McDonnell was considered an "outfit lawyer" 286 F.3d at 429 (App. at 13), or later engaged in criminality which resulted in his surrender of his law license, *United States ex rel. Collins v. Welborn*, 79 F.Supp.2d at 905 (App. at 93-94), is simply irrelevant with respect to whether he rendered Bracy effective assistance, and, more importantly, with respect to whether his appointment was part of some nefarious scheme by Judge Maloney to effectuate actual bias against Bracy.

Regarding both McDonnell, and Irwin Frazin, Collins' attorney, the District Court found:

> There is no basis to disregard the finding of the Illinois Supreme Court that the "record indicates that both attorneys were experienced criminal lawyers. They conducted vigorous cross-examina-

> tion, raised countless objections, adequately presented the alibi defenses, and in all respects sought to protect the interests of their clients." [Citations omitted].

United States ex rel. Collins v. Welborn, 79 F.Supp.2d at 905-906 (App. at 94). Judge Evans' decision appears inconsistent with those findings of fact.

Judge Evans' opinion is flawed in other respects, as well. He relies on other cases over which Judge Maloney presided to show that Judge Maloney engaged in compensatory bias, specifically, *People v. Hawkins*, 181 Ill.2d 41, 690 N.E.2d 999 (1998), *People v. Titone*, No, 83 C 127, and *People v. Davis*. As pointed out in the Court of Appeals' panel opinion, the first two of those cases do not show that Judge Maloney engaged in compensatory bias. In one, Judge Maloney returned a bribe because he realized that he was under investigation and in the other he convicted the defendant notwithstanding that he had received a bribe. Neither case had anything to do with compensatory bias, which is a theory that Judge Maloney ruled in favor of the prosecution in cases in which he was not bribed to cover his wrongdoings in cases in which he was bribed. *Bracy v. Schomig*, 248 F.3d at 608 (App. at 61-62). While the third example arguably supports a compensatory bias theory as to that case and the attorney who failed to bribe Maloney in it, it does not support the concept that Maloney engaged in compensatory bias more globally, and particularly in this case in which that attorney was not involved.

He further relies on the "blueprint for compensatory bias" espoused by the federal government at Judge Maloney's sentencing hearing. *Bracy v. Schomig*, 286 F.3d at 413 (App. at 11). As Judge Posner aptly noted regarding this "evidence,"

> But no substantiation or elaboration is offered. No cases in which Maloney may have engaged in com-

> pensatory bias are cited; no *evidence*, direct or circumstantial, admissible or inadmissible, that he ever engaged in the practice is offered. The Justice Department was pressing for a very long sentence (more than 20 years), and it pulled out all the stops.

Bracy v. Schomig, 286 F.3d at 423 (App. at 30). The statement was merely the opinion of a federal prosecutor regarding Judge Maloney's misdeeds, and not "evidence" at all.

Judge Evans also focuses on Judge Maloney's ostensibly pro-prosecution discretionary rulings to support a finding of compensatory bias. 286 F.3d at 416-419 (App. at 16-23). Petitioners maintain that attributing such rulings to compensatory bias on Judge Maloney's part is an exercise in pure conjecture.

Like the District Court, Judge Evans cites to the purported importance Judge Maloney attached to this case, as evidenced by his comments in allocution at his own sentencing hearing. at 286 F.3d at 413; (App. at 12). Petitioners must question the apparent assumption that Maloney's comments were a statement that the death penalties meted out to the Respondents and their co-defendant Murray Hooper somehow evinced Maloney's sincere pro-prosecution stance. After all, juries imposed the death penalties on all three. *People v. Collins*, 106 Ill.2d 237, 478 N.E.2d 267 (1985); *People v. Hooper*, 172 Ill.2d 64, 665 N.E.2d 1190 (1996). Moreover, even were it such a statement, it is speculative to conclude that the statement says anything about compensatory bias at all, much less compensatory bias in those cases. Rather, the comments appear to have been puffery on Maloney's part regarding his rulings being affirmed on appeal, a somewhat overstated boast given that Hooper's original jury-imposed death penalty over which Maloney presided indeed was reversed on appeal. *People v. Hooper*, 133 Ill.2d 469, 552 N.E.2d 684 (1989).

Finally, Petitioners cannot help but note the majority's focus on the Respondents' death penalty hearing, almost to its exclusion of consideration of their trial. The District Court found that "[a] judge attempting to bolster his reputation as a harsh judge to whom it would be worth paying a bribe can certainly build on that reputation by presiding over a case in which the death penalty is imposed. *United States ex rel. Collins v. Welborn*, 79 F.Supp. 2d at 910; (App. at 103). That well may be so, but, to the extent that such motivation might exist, it would appear to be as present with respect to a trial which leads to a death penalty hearing as it would with respect to the sentencing hearing itself. Indeed, Judge Posner has opined that

> [t]he incentive to engage in compensatory bias is *stronger* at the trial of guilt than at the sentencing hearing. Most criminal defendants are convicted, so a judge who wants a reputation as a tough sentencer, to induce bribes or to avoid charges of undue lenity, will have an incentive to make rulings favorable to the prosecution, so that the defendant will not walk. Had these triple-murdering defendants been acquitted, eyebrows might have been raised. But the imposition of the death sentence is a matter of grace to be determined by the jury. Maloney would not have been "blamed" if the jury had exercised its unreviewable power of lenity and declined to recommend sentencing Bracy and Collins to death. For all we know, that is a common sequel to the convictions of defendants in capital cases in Illinois.

286 F.3d at 424 (App. at 32). As Judge Posner has observed, "[t]here is a lot of 'death is different' talk in Judge Evans's opinion[,]" possibly suggesting "that compensatory bias has a different meaning in capital-sentencing than in other proceedings[,]" "a position Bracy's own lawyer rejected at the en banc argument." 286 F.3d at 424-425 (App. at 32-33).

Against this background, one cannot help but wonder whether the District Court and, in turn, the *en banc* majority, attempted to "split the baby." There is no principled legal basis for their having done so. Certiorari should be granted to correct this error.

CONCLUSION

For the aforementioned reasons, Petitioners, James Schomig and Jonathon Walls, respectfully request that this Honorable Court grant *certiorari*, reverse the decision of the United States Court of Appeals for the Seventh Circuit, and remand for further proceedings.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

JAMES SCHOMIG

Petitioner,

Vs.

WILLIAM BRACY

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Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

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I. The *En Banc* Court of Appeals Did Not Violate This Court's Mandate

There are two reasons why the State is incorrect in arguing that the *En Banc* Seventh Circuit violated this Court's mandate, which purportedly requires proof of actual bias in Petitioner's own case.[1] The first is that there was no such mandate. In its previous opinion in this case, this Court deferred elucidation of the Due Process standard and focused instead on the issue of discovery. *Bracy v Gramley*, 520 U.S. 899 (1997) While the Court stated that Petitioner would prevail if he succeeded in proving actual bias in his own case, it never held that this was the exclusive means by which he could establish a Due Process violation anymore than it held that Petitioner could prevail only if he proved that the Petitioner's trial counsel was Thomas Maloney's former law partner. If the mandate of the Court had been made as clear as the State now suggests, then the opinions of the Seventh Circuit Judges would never have diverged as sharply as they did on this issue and there would have been no arguable basis for the dissenting opinion that proof of temptation to be biased is all that the law requires. See Dissenting opinion of Judge Rovner, *Bracy v. Schomig*, 286 F.3d 406, 433 (7th Cir. 2002). The second reason why the State's claim is unfounded is that the Seventh Circuit plurality applied an actual bias standard and sustained the District Court's finding that Thomas Maloney was biased in Petitioner's own case. Id. at 418. The State is thus reduced to quibbling with the

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[1] The State appears to take an even more extreme position in arguing that Respondent can only establish a Due Process violation if he presents direct evidence of bias. See, Petition at 9. In other words, short of a confession by Thomas Maloney, Respondent could not hope to establish a Due Process violation and thus there would have been no reason to order discovery. However, this view of the law was rejected when the Court reversed the Seventh Circuit's earlier decision denying discovery.

evidence although it totally fails to explain why the evidence is insufficient under the clear error standard of Federal Civil Rule 52(a).

II. There Was Ample Evidence to Support The Findings of Actual Bias

In spite of the State's claim to the contrary, there is ample evidence to support the finding of actual bias, not the least of which is an official Government report (unchallenged in the District Court) which concluded that Thomas Maloney regularly engaged in compensatory bias as a means to further his racketeering scheme.[2] While it is true that much of the evidence was indirect and circumstantial, this case is no different than any other case in which motive or intent are in issue, in which it is customary for the fact finder to rely on circumstantial evidence. Maloney's questionable rulings in the sentencing phase (as well in the in the guilt phase) are part of the body of circumstantial evidence which support the finding of actual bias, although by themselves they are not an appropriate basis for affirming the conviction or setting it aside. By asking this Court to second guess the District Court and the Court of Appeals, and assume the role of fact finder, the State fails to present a cert worthy question under Supreme Court Rule 10(c).

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[2] When this case was last before this Court, there was no clear evidence that Thomas Maloney ever engaged in compensatory bias and thus it may have been appropriate to wonder whether Maloney's bribe taking led him to be pro-prosecution or pro-defense as a means of concealing his corruption. Subsequent to remand, the District Court made a finding that Maloney engaged in pro-prosecution compensatory bias in Petitioner's own case, which was based upon information gathered in discovery, including specific examples of compensatory bias in other cases as well as the official Government report which found that Maloney regularly engaged in compensatory bias as a means to conceal his corruption and to encourage others to pay bribes.

III. Conclusion

Respondent concurs with the State's suggestion that the Court should review this case, but not for the reasons set forth in the Petition. Respondent maintains that both the standard and method of proving a Due Process violation in judicial corruption cases are unclear and that the law in this area should be settled by the Court. Respondent maintains that if actual bias is the standard, there was ample evidence to support the District Court's determination that it existed in this case. However, once having found the existence of bias, the Seventh Circuit plurality disregarded established Supreme Court precedent and improperly relied on harmless error analysis to affirm the conviction. Finally, Respondent maintains that contrary to the position of the State and the Seventh Circuit plurality, an interest in the outcome of the case is by itself sufficient to establish a Due Process violation.[3] These are the reasons why Respondent's petition, which as been separately filed in this case, should be granted. However, the State's petition is based upon an erroneous assumption as to what the Court previously held in this case, as well as the incorrect assertion that the lower court's finding of actual bias is properly subject to challenge in the absence of clear error. The State's petition should therefore be denied.

Respectfully submitted this 23rd day of July, 2002.

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[3] The existence of Maloney's interest in the outcome of Respondent's case was proved in the District Court through the uncontested evidence that he regularly used his office as a means to further his racketeering scheme, even in those cases in which he did not receive bribes.

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No. 02-19

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

JAMES SCHOMIG

Petitioner,

Vs.

WILLIAM BRACY

Respondent.

NOTICE OF FILING AND CERTIFICATE OF SERVICE

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Please take notice that I have filed the required number of copies of the Brief in Opposition with the United States Supreme Court, copies of which are hereby served upon you, by mailing from Seattle, Washington, first class postage prepaid on the 23rd day of July, 2002.

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